

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

State of Florida,
Plaintiff,

Case No. 2010-CF-7123-O
Division 22

Vs.

Nichole Brown,
Defendant.

_____ /

DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW, the Defendant, Nichole Brown, by and through her undersigned attorney, and moves this Court for a new trial pursuant to Florida Rules of Criminal Procedure 3.580 and 3.600 and as grounds therefore, states as follows:

FACTS

Defendant was tried by jury and convicted of seven counts on September 20, 21, and 22, 2010. The counts for which Defendant was convicted were two counts of robbery with a firearm, two counts of aggravated assault with a firearm, one count of false imprisonment with a weapon, one count of aggravated battery with a firearm, and one count of fleeing and eluding with wanton disregard. The State proceeded on a principle theory, since there was no evidence that Defendant was present at the actual robbery, rather, she was accused of driving the getaway car.

On September 20, prior to the commencement of jury selection, or *voir dire*, the trial judge called a bench conference, at which he informed defense counsel and the prosecuting attorney of some literature in the form of pamphlets or brochures that was being handed out to prospective jurors in front of the courthouse. There were two separate brochures, and copies thereof are attached as Defense exhibit "A". The

brochures purported to be from organizations touting themselves as the "Fully Informed Jury Association (FIJA)" and the "American Jury Institute (AJA)." The brochures referred to, among other issues, "jury nullification," "following the law," "hanging the jury," and "following your conscience." In summary, the relevant portions of the material said that jurors could disagree and hang a jury and could follow their conscience during deliberations.

At the aforementioned bench conference, the Court asked the attorneys what should be done if the jury venire was exposed to the brochures. Defense counsel took the position that they should be ignored, since the mere mention of them would only increase the jury and the jury venire's awareness of the issues discussed in the material, and thus create distractions and interfere with the jury's deliberation. The State advocated the position that the court should instruct the jury venire to ignore the brochures, assuming that the venire had been exposed to them.

The court sided with the State over defense counsel's objection, and proceeded to discuss the material with the jury venire, once it was established that the venire had, in fact, been exposed to the material. When the court inquired about exposure to the brochures, more than half of the prospective jurors raised their hands. The court then told them to ignore the materials. This left defense counsel in the unenviable position of trying to minimize the effect of the judge's instructions regarding the brochures, while also trying to pick a jury free of taint or preconceptions. When it became clear that the court was going to proceed to trial with a jury pool which had essentially been admonished that they could not "hang the jury" or use their conscience during the deliberations, Defense counsel elected to not discuss the issue with the venire any more,

for fear of making the issue even more paramount in the jurors minds. Defense counsel reasoned that the more the subject was discussed, the greater the likelihood that the material would become the "elephant in the room" during deliberations and cause bias toward prospective individual jurors who disagreed with other jurors.

Defense counsel made a standing objection to the mention of the brochures, and moved to quash the venire. The issue was compounded when the Assistant State Attorney, during her *voir dire*, stated to the venire that a jury must reach a verdict. Defense counsel objected to this statement, was overruled, and subsequently tried to rehabilitate the venire during his *voir dire*, stating that there was no requirement that they all agree.

Ultimately, a jury was seated, over defense counsel's objections, and the case proceeded to trial. On Wednesday, September 22, immediately preceding the charging of the jury, the Court once again made reference to the disputed material, stating that the persons who were disseminating the material were "idiots." This drew a contemporaneous objection from defense counsel, at which point, defense counsel was told by the Court to "take a seat." Subsequent to the reading of the jury instructions, counsel for the defense renewed his objection and moved for a mistrial. The motion was denied, and the jury returned verdicts of guilty as charged on all counts.

ARGUMENT

Florida Rule of Criminal Procedure 3.600(b) states that "the Court shall grant a new trial if any of the following grounds is established, providing substantial rights of the Defendant were prejudiced thereby:

...(7) The Court erroneously instructed the jury on a matter of law or refused to give a proper instruction requested by the defendant.

(8) For any other cause not due to the defendant's own fault, the defendant did not receive a fair and impartial trial."

Both the jury venire and the jury itself were irreparably tainted and prejudiced by the Court's and State's comments regarding the brochures, as well as the State's comment during *voir dire* that the jury must reach a verdict. The material that was being handed out in front of the courthouse did not prejudice either party, and as an out-of-court representation made to potential jurors before they set foot in the courthouse, did not bear mention and was harmless. However, once the material was discussed throughout jury selection, and especially prior to the reading of jury instructions, when the material was referred to as being handed out by "idiots," the Defendant was denied her right to fair deliberations.

The crux of the issue is the fact that the material (which a number of jurors received) stated that "you (the juror) have a right to 'hang' the jury with your vote if you cannot agree with the other jurors." (FIJA pamphlet, Defense Exhibit A) The other brochure that was handed out to the venirepersons was from the "American Jury Institute," and it stated that "you can 'hang the jury with your vote if you feel it is the right thing to do. No one can force you to change your mind, and there is no law or rule of court procedure that says a jury has to reach a verdict." (AJA pamphlet, Defense Exhibit A).

So, jurors were given literature that spoke of their right to disagree, and the persons that handed out the literature were called idiots by the trial judge, drawing a contemporaneous objection by the defendant's lawyer, and causing the "idiot" comment to reflect back on defense counsel. "...[R]eversible error may appear where the trial court deviates from the standard charge and gives improper admonitions which, among

other things, make it clear that the jury must reach a verdict in the cause." *Warren v. State*, 498 So. 2d 472, 476 (3rd DCA 1986). While *Warren* deals with an improper jury deadlock charge, or "Allen charge," as opposed to the comments made prior to the deliberations in Defendant's case, the jury in this case was not even given the opportunity to disagree or engage in constructive repartee, thus undermining the free discussion of the case and preventing the jury deliberations from flowing in their own natural direction.

Florida's Standard Jury Instruction, the state's revised "Allen charge," reads in part, "that it is legally permissible for a jury to disagree." Fl.Std.JuryInst. 4.1 (Jury Deadlock). The jury in Defendant's case was told this wasn't the case. If someone on Defendant's jury wished to disagree, other juror or jurors could and perhaps would respond that they were doing what the brochures said was permissible, despite the judge's admonitions that following the literature's advice was not permissible and that it was handed out by "idiots." Due to these circumstances, Defendant's jury was poisoned before they even had the opportunity to deliberate.

The State may argue that defense counsel's attempts to rehabilitate the jury during jury selection on the hung jury issue made the matter moot. But when defense counsel objected to the State's comments about how a jury must reach a verdict as a misstatement of the law, the trial judge overruled counsel's objection. This, combined with the statements by the trial judge about the brochures further tainted the jury's deliberations.

The disputed material also stated that "you may--and should--vote your conscience." (FIJA pamphlet Exhibit A). While there may be some disagreement as to whether this corresponds with an instruction to follow the law, it certainly is indisputable that an "Allen Charge" "is designed to bring a deadlocked jury together, if possible, so that a

unanimous verdict may be rendered without any juror giving up his or her *conscientious* convictions." *Warren*, at 475 (emphasis added). Once again, the trial court's derision toward the material poisoned the jury's deliberations, and quite possibly poisoned the jury toward defense counsel, since defense counsel was compelled to object to the comments on the material and told to "take a seat." The fact that the court made its derisive comments immediately before it charged the jury on the law heightened the effect of the court's statements.

In *Nelson v. State*, 438 So.2d, the Court stated that "[I]t is the genius of our jury system that twelve impartial persons, individually, applying a subjective standard, come to a common conclusion of defendant's guilt beyond a reasonable doubt. This fundamental principle becomes subverted if a jury member is pressured to defer to the opinion of his peers, for unanimity is made a sham thereby. An objective standard is in effect substituted for the subjective, by virtue of the implication that the majority opinion is reasonable, and the minority, unreasonable." *Id.* at 1062 (4th DCA 1983). The material in the instant case that jurors were exposed to sought to make a similar point, stating, "[Y]ou can hang the jury with your vote..." (AJA pamphlet Exhibit A). This is not idiotic. This is not "garbage," as the court referred to it outside the jury's presence. This is a core tenet of the American jury system. "*Nothing* should be said by the trial court to the jury to that *would or could* likely influence the decision of a single juror to abandon his *conscientious* belief as to the correctness of his position." *Lee v. State*, 239 So.2d 136, 139 (Fla.1st DCA 1970) (emphasis added).

The Court's and State's comments on the disputed material essentially negated the potential conscientiously held beliefs of individual jurors, and potentially affected the

jurors' ability and incentive to hold out in the face of adverse opinions and hence, the jury was erroneously instructed. The Defendant did not receive a fair and impartial trial, and it was through no fault of her own.

WHEREFORE, Defendant moves this Court for a new trial.

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney, 425 N. Orange Ave. Orlando, FL, on this 1st day of October, 2010.

Scott Harrison
Attorney at Law
FBN 0073806
655 Bryn Mawr St.
Orlando, FL 32804
(407) 644-0134